Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1837

THEODORE ALFRED LILIENTHAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Theodore Alfred Lilienthal, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment entered against him on May 7, 1974.

A

Opinion Below

On May 7, 1974, the petitioner's appeal to the United States Court of Appeals for the Second Circuit was affirmed and a copy of the Opinion is annexed hereto and marked as Appendix A.

B

Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C

Questions Presented

1. Whether the necessity of the statutory minimization requirement in wiretap warrants or orders shall be strictly construed.

2. Whether the electronic surveillance statutes are unconstitutional in that they violate the right of privacy.

D

Statutes Involved

Title 18, United States Code, Section 2515

Title 18, United States Code, Section 2518(5)

New York State Criminal Procedure Law, Section 700.30(7).

E

Statement of the Case

The petitioner, Theodore Alfred Lilienthal, was tried along wtih seven others for a violation of Title 21, United States Code, Section 846, a narcotics conspiracy. In addition there were substantive counts and Mr. Lilienthal was charged with one count of possession and one count of distribution of heroin. After a trial before a jury the petitioner was convicted of all three counts with which he was charged.

The petitioner was sentenced to concurrent terms of eight years' imprisonment and five years' special parole on all three counts and a $2500 fine on the conspiracy count.

The prosecution below related to the dealings in narcotics which the jury found, orchestrated principally, according to the government's case, by the defendant Alphonse Cirillo.

Although some of the defendants at trial were apprehended with a sizable amount of heroin in their possession, there was no such proof as to the petitioner.

The proof against the petitioner consisted of overheard phone conversations between the petitioner and Alphonse Cirillo, overheard phone conversations between Cirillo and another defendant during which Cirillo mentioned the petitioner, and the observations of agents following the petitioner. Without going into a detailed recitation and factual analysis, it may fairly be stated that without the overheard phone conversations themselves and the light they cast upon the observations by the agents of the petitioner, the proof against the petitioner would be grossly inadequate to sustain a conviction. The petitioner was never seen with any observable heroin, nor did he ever mention heroin directly. The entire case against the petitioner comes to light only with the aid of the overheard phone conversations.

Reasons for Granting the Writ

1. The decision below raises a significant question concerning whether the necessity of the statutory minimization requirement in wiretap warrants or orders shall be strictly construed.

The wiretap warrant below was authorized under Article 700 of the New York State Criminal Procedure Law. That law is virtually a re-enactment of the federal statutes governing electronic surveillance, and, it is submitted, should be construed by the same standards.

Broadly put, the federal statutes place limitations on the use of electronic surveillance. Anything less than strict adherence to the procedural safeguards contained in

the statutes amounts to a Fourth Amendment Constitutional violation. 18 U.S.C. 2515.

One such procedural safeguard is the requirement of 18 U.S.C. 2518(5) that "every order and extention * * * shall contain a provision that the authorization to intercept * * * shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception * * *". The same procedural safeguard is embodied in Section 700.30(7) of the New York Criminal Procedure Law.

The original wiretap warrant or order in this case did not contain this procedural safeguard.

The four extensions obtained by the prosecutors did contain this procederal safeguard. However the four extensions depended upon the original order for probable cause, as noted in the opinion below in footnote 3.

The decision below is in part based upon the prosecution argument that although it is true that the warrant contained no such directive, in fact, the two prosecutors involved were aware of the requirement to minimize and so instructed the agents executing the warrant. Affidavits by the prosecutors and agents attesting to this were received by the trial court.

In cases involving electronic surveillance by warrant, the only protection against abuse of authority and undue invasion of privacy is the requirement of a neutral, detached magistrate who will look to see that the procedural safeguards are met.

It is submitted that the procedural requirements of both the federal statutes and the New York statute should be strictly construed. *Gelbard* v. *United States,* 408 U.S. 41 (1972); *Application of the United States for Relief,* 427 F. 2d 639 (9th Cir. 1970); *United States* v. *Scott,* 331 F. Supp. 233 (U.S.D.C., D. C. 1971).

It is further submitted without lengthy argument that the procedural safeguards required by these statutes should not be watered down by after-the-fact supplemental affidavits by the very prosecutors and agents involved in the action, as was the case here. *Whitely* v. *Warden of Wyoming Penitentiary,* 401 U.S. 560 (1971).

This case, involving a New York warrant as it does, would appear to be controlled by the New York statute. *United States* v. *Tortorello,* 480 F. 2d 764 (2nd Cir. 1973).

New York case law on the point seems clear that without an express provision concerning minimization in the order, the interception is invalid as violative of the strict requirements of the Criminal Procedure Law 700.30(7). *People* v. *Pieri,* 69 Misc. 2d 1085, 332 N.Y.S. 2d 786; *People* v. *Holder,* 69 Misc. 2d 863, 331 N.Y.S. 2d 557 (decided upon the prior statute with an identical requirement); *People* v. *Kennedy,* 347 N.Y.S. 2d 327.

Finally, this Court's recent action in *Bynam* v. *United States,* 15 Cr L 4057, seems to indicate that in the sensitive area of electronic surveillance, strict adherence to the procedural safeguards of the governing statutes must be complied with.

To the extent that the opinion below has the effect of lessening the standards of construction in this area of the law, it is submitted that a significant question is raised to which this Court should address itself.

2. The decision below raises a significant question concerning whether the electronic surveillance statutes are unconstitutional in that they violate the right of privacy.

It is submitted that all wiretapping and bugging under statutory authority, whether federal or New York, is violative of the right of privacy under the Fourth and Ninth Amendments to the Federal Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution as it applies to New York, decided opinion to the contrary. *United States* v. *Tortorello,* 480 F. 2d 764 (2nd Cir. 1973).

To date, however, this Court has not definitively ruled on this issue.

Reference is made to Mr. Justice Douglas' concurring opinion in *Gelbard* v. *United States,* 408 U.S. 41 (1972).

Conclusion

For the reasons here and above set forth this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: New York, New York